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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

KIMBERLY NEILSEN, Plaintiff and Appellant, v. SCOTT KAZARIAN, Defendant and Respondent.	B284287, B287623 (Los Angeles County Super. Ct. No. BC636514)

APPEAL from a judgment of the Superior Court of Los Angeles County, Dan T. Oki, Judge. Reversed in part and affirmed in part.

Alan Charles Dell'Ario; Winer, McKenna & Burritt, John Douglas Winer and Shawn D. Tillis for Plaintiff and Appellant.

Callahan, Thompson, Sherman & Caudill, O. Brandt Caudill, Jr., and Joan E. Trimble for Defendant and Respondent.

Kimberly Neilsen (Neilsen) appeals from a judgment after the trial court sustained without leave to amend Scott Kazarian's (Kazarian) demurrer to Neilsen's first amended complaint. Neilsen sued Kazarian, her former therapist, for negligent and intentional torts, alleging that Kazarian engaged in inappropriate nonsexual and sexual contact with Neilsen under the guise of treatment. The trial court found that all of Neilsen's causes of action were barred by the Medical Injury Compensation Reform Act's (MICRA) (Code Civ. Proc., § 340.5) one-year statute of limitations governing professional negligence claims against healthcare providers. In addition to being time-barred, the trial court also found that the statements and omissions underlying Neilsen's fraud causes of action were nonactionable opinion; that there was no private right of action under Business and Professions Code section 729; and that Neilsen had not alleged any unfair, unlawful, or fraudulent business practice under Business and Professions Code section 17200. For the reasons set forth below, we reverse the judgment in part and affirm in part.

FACTUAL AND PROCEDURAL BACKGROUND

Because this appeal arises from a demurrer, we summarize the facts as they are alleged in the operative pleading. (*Landmark Screens, LLC v. Morgan, Lewis & Bockius, LLP* (2010) 183 Cal.App.4th 238, 240.)

Neilsen sought mental health treatment from Kazarian in 2013 in order to address her depression, issues related to her childhood adoption, and her relationship with her son's father. Kazarian advertised himself as an expert in the area of treating people with adoption issues, informing his patients that he himself was adopted. Neilsen alleged that, during her therapy with Kazarian, he used what Neilsen characterized as "cuddling

sessions" or a "cuddling technique" under the guise of a special adoptive and attachment treatment. Kazarian told Neilsen that the cuddling would "rewire" her brain and led her to believe that the full body contact was part of her treatment. Around the time Kazarian initiated these cuddling sessions, he also asked Neilsen if she wanted to make out, whether she was attracted to him, whether she thought about him sexually, and whether she was willing to have sex with him as part of treatment. When Neilsen asked Kazarian about his wife, he replied, "My wife understands the kind of work that I do and is [okay] that I do whatever I need to do to help people." Neilsen alleged that she felt "uncomfortable" during the cuddling sessions. Neilsen's last therapy session with Kazarian was in December 2014.

On September 29, 2015, at a custody hearing involving Neilsen's son, a child custody evaluator testified as to information she received from Kazarian about Neilsen's therapy and mental condition. Kazarian did not invoke the physician-patient privilege or notify Neilsen that he was divulging her medical information. Kazarian told the child custody evaluator that Neilsen was erratic, prone to extremes, that the child's father was the more rational parent, that Neilsen's complaints of domestic violence were baseless,[1] and that Neilsen suffered from borderline personality disorder, a diagnosis that Neilsen alleged never came up during therapy. Neilsen further alleged that Kazarian's statements to the child custody evaluator contradicted earlier positive assessments and were made to discredit her and undermine any claim she may bring against him. Neilsen alleged

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[1] At the time Kazarian was treating Neilsen, he was also treating Neilsen's son's father.

that as a result of Kazarian's statements, she lost custody of her son.

At the end of 2015, Neilsen began treatment with another therapist. Neilsen alleged that, during this treatment, she gradually began to realize that Kazarian's treatment may have been unethical. Finally, in 2016, Neilsen realized her therapy with Kazarian had been harmful to her. Prior to this realization, Neilsen was unaware that Kazarian's actions were potentially actionable.

On October 6, 2016, Neilsen filed a complaint against Kazarian. Kazarian demurred. The trial court found that Neilsen's claims were barred by MICRA's one-year statute of limitations and that Neilsen had not alleged an actionable misrepresentation. However, the trial court granted Neilsen leave to amend and Neilsen filed her first amended complaint, alleging causes of action for (1) negligence, (2) intentional infliction of emotional distress, (3) fraud, (4) constructive fraud, (5) negligent misrepresentation, (6) sexual battery by a therapist in violation of Civil Code section 43.93, (7) sexual contact by a therapist in violation of Business and Professions Code section 729, (8) breach of fiduciary duty, and (9) violation of Business and Professions Code section 17200.[2] Neilsen's first amended complaint also included new allegations about Neilsen's delayed discovery that Kazarian's conduct was harmful. Once

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[2] The causes of action are numbered in accordance with the allegations in the body of the complaint. The caption page of the first amended complaint switches Neilsen's seventh and eighth causes of action for sexual contact by a therapist in violation of Business and Professions Code section 729 and breach of fiduciary duty.

again, Kazarian demurred. The trial court sustained the demurrer without leave to amend. Neilsen filed this timely appeal.

DISCUSSION

I. Standard of review

"On appeal from a judgment dismissing an action after sustaining a demurrer without leave to amend, the standard of review is well settled. The reviewing court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] The court does not, however, assume the truth of contentions, deductions or conclusions of law. [Citation.] The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.] And it is an abuse of discretion to sustain a demurrer without leave to amend if the plaintiff shows there is a reasonable possibility any defect identified by the defendant can be cured by amendment." (*Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 966–967.) We review the legal sufficiency of a complaint de novo. (*Montclair Parkowners Assn. v. City of Montclair* (1999) 76 Cal.App.4th 784, 790.)

II. Neilsen has sufficiently alleged her delayed discovery of her injury

When it ruled on Kazarian's demurrer, the trial court did not make express findings as to each of Neilsen's causes of action. Instead, the trial court concluded that Neilsen's entire complaint was barred by MICRA's one-year statute of limitations (Code Civ.

Proc., § 340.5) because the allegations underlying each of Neilsen's causes of action arose within her treatment relationship with Kazarian. The trial court also found Neilsen's allegations of delayed discovery were insufficient to toll the statute.

We disagree and find Neilsen's allegations of delayed discovery sufficient to toll the one-year limitations period. Because we find Neilsen has successfully pleaded her delayed discovery, we need not resolve whether Kazarian's alleged intentional torts are also subject to MICRA's one-year statute for professional negligence rather than the longer limitation periods for battery or intentional infliction of emotional distress (Code Civ. Proc., § 335.1 [two years]), fraud (*id.*, § 338, subd. (d) [three years]), or breach of fiduciary duty (*id.*, § 343 [four years]). That is, even if the one-year limitations period applies to them, they are timely under the delayed discovery rule.

"[U]nder the delayed discovery rule, a cause of action accrues and the statute of limitations begins to run when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed a factual basis for that particular cause of action. In that case, the statute of limitations for that cause of action will be tolled until such time as a reasonable investigation would have revealed its factual basis." (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 803.) In order to rely on the discovery rule for delayed accrual of a cause of action, a "plaintiff whose complaint shows on its face that his claim would be barred without the benefit of the discovery rule must specifically plead facts to show (1) the time and manner of discovery and (2) the inability to have made earlier discovery despite reasonable diligence." (*Id.* at p. 808,

italics omitted.) "[C]onclusory assertions that [the] delay in discovery was reasonable are insufficient and will not enable the complaint to withstand [a] general demurrer." (*Saliter v. Pierce Brothers Mortuaries* (1978) 81 Cal.App.3d 292, 297.) "A plaintiff is held to [his or] her actual knowledge as well as knowledge that could reasonably be discovered through investigation of sources open to [him or] her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1109.)

The trial court concluded here that Neilsen's allegations that she felt uncomfortable during her treatment should have alerted her to any wrongdoing or negligence on the part of Kazarian. The trial court reasoned that Neilsen's complaint was essentially a claim for sexual battery that accrued, at the very latest, when her treatment concluded in December 2014. Although a cause of action for battery generally accrues at the time of physical contact (*Sonbergh v. MacQuarrie* (1952) 112 Cal.App.2d 771, 774), Neilsen has alleged a type of battery accomplished through deception. The trial court did not consider the incremental nature of Kazarian's advances combined with his assurances that the physical contact was part of treatment. Thus, for the battery cause of action to accrue at the time of physical contact, Neilsen would also need to be aware, or at least be on notice, of the nature of the false treatment.

Moreover, a patient who is uncomfortable during treatment may reasonably rely upon her physician's soothing disclaimers and not suspect she has been wronged. (*Gutierrez v. Mofid* (1985) 39 Cal.3d 892, 899.) Even the best medical treatment may require a long and difficult recuperation period, have negative side effects, or cause discomfort. (*Ibid.*) For these and other reasons, one often has no prompt means of learning that she has

been hurt by medical malpractice because the injuries are not always immediately apparent. (*Brown v. Bleiberg* (1982) 32 Cal.3d 426, 434.) This may be even more true in the context of a malpractice suit for substandard mental health treatment, rather than, for example, an action for a botched surgery. A mental health injury is potentially more obscured because there may be no physical manifestation or pain to serve as impetus for a plaintiff to investigate a potential claim. Similarly, given the unique relationship between psychotherapist and patient which arguably involves a higher degree of intimacy and trust than, say, between patient and surgeon, the patient's reasonable reliance on the psychotherapist's assessment of her own reaction to therapy makes the patient particularly susceptible to her psychotherapist's assurances.

Here, Neilsen alleged that she began to realize that Kazarian's actions may have been wrong when she saw another therapist at the end of 2015, and that during 2016, she realized the behavior might be inappropriate and actionable. Neilsen filed her complaint in October 2016, within one year of discovering a potential claim. Thus, Neilsen's complaint was timely even under MICRA's strict one-year statute. " 'In order for the bar of the statute of limitations to be raised by demurrer, the defect must clearly and affirmatively appear on the face of the complaint; it is not enough that the complaint shows merely that the action may be barred.' " (*E-Fab, Inc. v. Accountants, Inc. Services* (2007) 153 Cal.App.4th 1308, 1315–1316.) The question of when there has been a delayed discovery, especially in malpractice cases, is a question of fact and " 'only where reasonable minds can draw but one conclusion from the evidence that the question becomes a matter of law.' " (*Brown v. Bleiberg*,

supra, 32 Cal.3d at p. 436.) Neilsen's allegations that she felt "uncomfortable" or even "very uncomfortable" do not establish as a matter of law that she should have been on notice of a potential professional malpractice claim against Kazarian, especially, in the context of his assurances that the treatment was legitimate.

We find that Neilsen's allegations were sufficient to invoke the delayed discovery rule and toll MICRA's one-year statute of limitations. Accordingly, Neilsen's complaint was timely.

III. Neilsen's third, fourth, and fifth causes of action for fraud, constructive fraud, and negligent misrepresentation

In addition to concluding that Neilsen's complaint was time-barred, the trial court also found that Neilsen's third, fourth, and fifth causes of action based on fraud failed for the additional reason that Neilsen had not alleged an actionable misrepresentation. Again, we disagree.

Neilsen alleged, among other things, that Kazarian represented "his kissing, cuddling, and cupping her breasts were a necessary component of her therapy, part of some special adoptive therapy technique that would help re-wire her brain[,] help her form better attachments and cure her depression." This statement falls squarely within the elements necessary to plead a cause of action for fraud which are: " ' "(a) misrepresentation (false representation, concealment, or nondisclosure); (b) knowledge of falsity . . . ; (c) intent to defraud, i.e., to induce reliance; (d) justifiable reliance; and (e) resulting damage." ' " (*Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 974.) Neilsen alleged that Kazarian misrepresented that the cuddling was a therapeutic technique designed to treat Neilsen's issues stemming from her adoption, but that, in fact, was a pretense to further Kazarian's own personal needs. Neilsen's

fraud theory is akin to her sixth cause of action for violation of Civil Code section 43.93, subdivision (b)(3) which creates a private right of action against a therapist who commits a sexual battery "[b]y means of therapeutic deception" which is defined as "a representation by a psychotherapist that sexual contact with the psychotherapist is consistent with or part of the patient's or former patient's treatment." (*Id.*, § 43.93, subd. (a)(5).) Therefore, Neilsen's allegations about Kazarian's statements regarding the cuddling constitute an actionable misrepresentation.

Likewise, because Neilsen's allegations are sufficient to allege fraud, they are also enough to support her causes of action for negligent misrepresentation and constructive fraud. The elements of fraud and negligent misrepresentation are very similar with the exception that negligent misrepresentation requires a positive assertion as opposed to an omission and does not require knowledge of falsity. (*Apollo Capital Fund, LLC v. Roth Capital Partners, LLC* (2007) 158 Cal.App.4th 226, 243.) As alleged, Kazarian may have believed that cuddling was a legitimate form of treatment even though he had no "reasonable ground for believing it to be true." (*Ibid.*) Constructive fraud requires the existence of a confidential relationship or fiduciary duty and a nondisclosure. (*Prakashpalan v. Engstrom, Lipscomb & Lack* (2014) 223 Cal.App.4th 1105, 1131.) A physician is under a fiduciary duty to disclose all information material to a patient's decision to receive treatment. (See *Moore v. Regents of University of California* (1990) 51 Cal.3d 120, 129.) Neilsen alleged that Kazarian was her therapist and failed to disclose the true nature of his treatment.

Accordingly, Neilsen's allegations that Kazarian misrepresented the nature of the cuddling therapy is a sufficient misrepresentation to plead fraud, constructive fraud, and negligent misrepresentation.[3]

IV. Seventh cause of action for Business and Professions Code section 729

Neilsen's seventh cause of action is for sexual contact by a therapist in violation of Business and Professions Code section 729. Neilsen concedes that there is no private right of action under this statute.[4] Instead, Neilsen contends that a violation of Business and Professions Code section 729 could support a finding of negligence per se. While this may be legally correct, negligence per se is not a separate cause of action, but an evidentiary presumption in an action for negligence. (*Johnson v. Honeywell Internat. Inc.* (2009) 179 Cal.App.4th 549, 555.) Nor does a theory of negligence per se create a "private right of action

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[3] The parties spend considerable time in their briefs arguing whether the litigation privilege protects Kazarian's statements to the child custody evaluator. Because we conclude that at least one of Kazarian's other statements supports Neilsen's fraud causes of action, we need not decide this issue. Similarly, because the eighth cause of action is based in part on allegations that Kazarian improperly disclosed confidential information to Neilsen's son's father, the litigation privilege does not bar this cause of action. Furthermore, whether Neilsen can allege a separate cause of action under the Confidentiality of Medical Information Act is not before us as she has not alleged a separate cause of action under that statute.

[4] Indeed, those in violation of Business and Professions Code section 729, subdivisions (a) and (b) are "guilty" of sexual exploitation by a physician and subject to "imprisonment."

for violation of a statute." (*Id.* at p. 556.) The trial court properly sustained the demurrer as to this cause of action.

DISPOSITION

The judgment is reversed as to Neilsen's first, second, third, fourth, fifth, sixth, and eighth causes of action. In all other respects, the judgment is affirmed. The parties are to bear their own costs on appeal.

NOT TO BE PUBLISHED.

DHANIDINA, J.

We concur:

LAVIN, Acting P. J.

EGERTON, J.